IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 10834 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

DILAVARSHA GULABSHA DIWAN

Versus

DISTRICT MAGISTRATE

Appearance:

1. Special Civil Application No. 10834 of 2004

MS. TEJAL DOSHI for HL PATEL ADVOCATES for Petitioner

MR HM PRACHCHHAK AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 19/01/2005

ORAL JUDGEMENT

1. This Special Civil Application under Article 226

of the Constitution of India has been filed by the petitioner challenging his detention in pursuance of the order passed against him by District Magistrate, Bharuch, on 21st of July, 2004, in exercise of powers conferred upon him under Section 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 (PASA Act for short). The petitioner is in detention as bootlegger from 21st of July, 2004 in pursuance of the above order.

2. The grounds of detention placed on record reveal that the detaining authority relied upon two types of material placed before him to arrive at the subjective satisfaction. Firstly, the detaining authority relied upon a criminal case registered against the petitioner under the Bombay Prohibition Act and three in-camera statements of the witnesses. A crime on 18th of June, 2004 came to be registered against the petitioner at Ankleshwar Police Station under Section 66(1)B, 65-AE, 81, 98 and 116 of the Bombay Prohibition Act whereby it is alleged that in all 396 bottles of foreign liquor was found from the possession of the petitioner. The detaining authority took into consideration thoroughly and exhaustively the investigation papers in the said crime. Secondly, the detaining authority also placed reliance on three in-camera statements, as recorded by sponsoring authority, on 8th of July, 2004 and as verified by the detaining authority on 19th of July, 2004 revealing the incidents of 2nd of June, 8th of June and 10th of June, 2004. The witness stated that on 2nd of June, 2004 while he was selling vegetables and fruits at about 3.00 p.m. on his hand-lorry, the petitioner and his accomplices approached to the witness with sticks and took out vegetables from his lorry. On demanding the price of vegetables by the witness from the petitioner, the petitioner was excited and he threatened the witness that how the witness dared to demand price of vegetables from the petitioner. The petitioner slapped the witness and rickshaw drivers who were parking their rickshaws around gathered there, but the petitioner and his accomplices gave abuse to those rickshaw drivers and rushed towards them with sticks to beat them, so rickshaw drivers ran away and terror was stricken in the area. The second witness narrated the incident of 8th of June, 2004. While he was returning to his house at about 5.00 p.m. from ONGC, the petitioner and his accomplices having hockey with them approached the witness and said that from Daman the petitioner was to receive bulk of foreign liquor and the witness was to take delivery of craters of foreign liquor. On refusing by witness, the petitioner was excited and started beating the witness. The shop owners of nearby area were gathered but the

petitioner and his accomplices rushed towards them to beat them. The area was terror stricken and on humbly requests from the witness, he was allowed to go. While third witness referred to the incident occurred on 10th of June, 2004 where at 11.00 p.m. in rickshaw the witness was at Hasti Talav, the petitioner approached the witness and insisted that the witness was to carry crates of foreign liquor in his rickshaw to near Tapi Hotel. On refusing by the witness, the petitioner was instigated and directed his associates to beat the witness. The petitioner took out rampuri knife and said to the passengers sitting in the rickshaw to vacate the rickshaw. Due to fear of the petitioner, the passengers of the rickshaw vacated the rickshaw. The area was terror stricken and by act of supplication by the witness he was allowed to go. From the above material, the detaining authority came to the conclusion that the petitioner was engaged in selling, storing and transporting foreign liquor knowing fully well that consumption of foreign liquor was injurious to health. The activities of the petitioner was obstruction to innocent citizens and due to activities of the petitioner, public order was disturbed. Due to fear of the petitioner, nobody dares to file complaint against the petitioner. The detaining authority also came to the conclusion that the activities of the petitioner were required to be prevented forthwith and that the petitioner was bootlegger within the meaning of the PASA Act. Therefore, the detaining authority passed the order of detention of the petitioner which is under challenge in this petition.

4. Learned Advocate Ms.Tejal Doshi for learned Advocate for M/s HL Patel Advocates for the petitioner and learned AGP Mr.H.M. Prachchhak for the respondents were heard at length. The affidavit-in-reply filed by the detaining authority as placed on record by learned AGP is also taken into consideration.

5. Out of various grounds urged on behalf of the petitioner and controverted and opposed by learned AGP, it appears that this petition can be examined and disposed of only on the ground that whether there was any material placed before the detaining authority to come to the conclusion that by the activities of the petitioner, the public order was disturbed and public health was adversely affected.

6. Undoubtedly, to reach to the subjective satisfaction that the activities of the petitioner was prejudicial to the maintenance of public order, there

must be some material before the detaining authority indicating that the activities of the petitioner directly or indirectly is causing or is likely to cause any harm, danger or alarm or feeling of insecurity among the general public life or any section thereof or a grave or widespread danger to the life, property or public health. The grounds of detention placed on record if taken into consideration, it clearly appears that merely filing of a case under the Bombay Prohibition Act against the petitioner and the facts constituting such offence cannot be said to be the activities disturbing the public order. A line has to be drawn between "breach of public order" and "breach of law and order". Cases may be filed against any person for the breach of law. He may also be punished if found guilty, but such activity cannot be branded as activities prejudicial to the public order especially in this case having regard to the investigating papers which are placed on record. Thus, mere filing of a criminal case would not lead to an inference that fact itself was sufficient to infer that by the activities of the petitioner, the public order was disturbed.

7. Then, thereafter the only material remains to be taken into consideration is in the shape of three incamera statements as recorded by the sponsoring authority and verified by detaining authority claiming privilege under Section 9(2) of the PASA Act. Going through those statements, it is clear that nothing is indicated in those statements that society at large or section thereof was so disturbed as to infer that by the activities of the petitioner public order was disturbed. At the most, those three narrated incidents can be said to be breach of law and order and can be taken care of by ordinary general law. Before passing the order of detention, it appears that, there was therefore no cogent material before the detaining authority to come to the conclusion that by the activities of the petitioner, public order was disturbed. The facts of this case are squarely covered by a decision of this Court in the matter of ASHOKBHAI JIVRAJ @ JIVABHAI SOLANKI vs. POLICE COMMISSIONER, SURAT, as reported in 2000(1) GLH, 393, wherein in para 20 and 21, the Division Bench of this Court observed as under :

> "20 The Division Bench then considered the law laid down by the Apex Court in Piyush Kantilal v. Commissioner of Police, Ahmedabad City, AIR 1989 SC 491 and T. Devaki vs. State of Tamil Nadu, AIR 1990 SC 1086. In Piyush Kantilal, similar circumstances were before the detaining

authority and it was alleged that detention of the detenu was necessary in order to prevent activities of the detenu in maintenance of public order. Similarly in T. Devaki, panic amongst people in the hall in which the incident took place and in nearby vicinity was highlighted. It was also alleged that people were scared and had run helter-skelter. In spite of such allegations, the Supreme Court held that they were not cases of maintenance of public order and hence, no action of preventive detention was uncalled for.

21. The Division Bench, following the above cases, observed that in the opinion of the Supreme Court, the selective phrases in the statements would not take out the case from maintenance of law and order to that of maintenance of public order and as power of detention, could not be used for maintenance of law and order, but only for public order, the order of detention made in such circumstances could not be upheld.

Again in Mustakmiya Jabbarmiya Shaikh vs. M.M. Mehta, Commissioner of Police and Others, 1995 (2) GLR 1268 (Sc), the Supreme Court considered the relevant decisions on point including the decisions in Arun Ghosh v. State of West Bengal, 1979 (1) SCC 98 and held that stray incidents would not affect "public order" and order of detention cannot be passed in such cases."

8. In this view of the matter, it clearly appears that there was no cogent material before the detaining authority to come to the conclusion that the activities of the petitioner was prejudicial to the maintenance of public order, the subjective satisfaction of the detaining authority in this respect in absence of cogent material is not valid, legal and in accordance with law. The order of detention under challenge therefore requires to be quashed and set aside on this ground alone.

9. In the result, the the petition is allowed. The order passed by District Magistrate, Bharuch, on 21st of July, 2004, against the petitioner in exercise of powers under Section 3(2) of the PASA Act is hereby quashed and set aside. The petitioner - Dilawarsha Gulabsha Diwan is hereby ordered to be set at liberty forthwith if he is not required to be detained in jail for any other

purpose. Rule made absolute. DS permitted.

(J.R. Vora, J.)

p.n.nair